Supreme Court, U. S.
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No. 73-858

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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**ALFREDO GONZALEZ**, individually and on behalf of all others similarly situated,

*Appellant*,

vs.

**AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP.** and **WOOD ACCEPTANCE CORP.**, individually and as representatives of all others similarly situated, and **MICHAEL J. HOWLETT**, Successor to **JOHN W. LEWIS**, Secretary of State,

*Appellees*.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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## REPLY BRIEF FOR THE APPELLANT

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*Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

## REPLY BRIEF FOR THE APPELLANT

### SUMMARY OF ARGUMENT

**I. Jurisdiction Of This Court Over The Direct Appeal**

The plain words of 28 U.S.C. §1253 and a long line of unchallenged decisions confer jurisdiction in this Court over direct appeals from final orders by three-judge district courts dismissing an action. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541, 41 L.Ed.2d 424 (1972),

*Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962). Neither the reasons for dismissing the case nor the correctness of the decision are relevant as long as the three-judge court was properly convened. Since plaintiff in this case raised a substantial constitutional claim against the Illinois Secretary of State and seeks to enjoin him from enforcing a state statute, the three-judge court was properly convened. This Court therefore has jurisdiction over plaintiff's appeal from the final judgment order of the three-judge court denying plaintiff's prayer for an injunction by dismissing this cause. Mercantile's proposition that section 1253 applies only in those cases where the granting of an injunction results in the "improvident doom" of a state statute is without merit. Section 1253 specifically grants a direct appeal from a three-judge court order "granting *or denying*" an injunction.

If Mercantile's position were adopted as a matter of policy, it would make an unworkable shambles of the three-judge court procedure. At the moment, the procedural rules in this area of three-judge court litigation are well defined. When a properly convened three-judge court has dismissed an action, this Court has never failed to take jurisdiction of a direct appeal from the dismissal. Reversing this well established rule would only confuse the already overly complex three-judge court practice. Mercantile's theory would thus be unworkable in practice and would increase rather than decrease the workload of this Court.

## II. Jurisdiction Of The Three-Judge Court

Plaintiff's substantial constitutional claim is a challenge to those sections of the Illinois Motor Vehicle Code that authorize the Secretary of State to terminate and transfer certificates of title without a hearing after a repossession.



Illinois law grants detailed due process protection to all involuntary transfers of title except following a repossession and thus destroys any contention that either the certificate or its termination is "nominal." Ill.Rev.Stat. ch. 95½, §2-118. After a repossession, the Secretary transfers title without notice from the Secretary, without a hearing and without judicial or other independent third party review. In fact, the procedure adopted by the Secretary during this litigation delegates his discretionary powers to one of the parties to the underlying dispute. The Secretary does not specify the form of notice to be sent to the debtor, does not specify the grounds of defense that may be relied upon by the debtor, does not specify the form of affidavit of defense and does not review creditors' determinations of whether affidavits sent in are proper. The Secretary summarily transfers title solely upon conclusory statements filed with him by creditors.

This new procedure, adopted by the Secretary in order to avoid a temporary restraining order, does not provide the due process protections required by this Court in *Mitchell* v. *W. T. Grant Co.*, ..... U.S. ....., 40 L.Ed.2d 406 (1974). It puts the Secretary in a role close to that of the court clerk in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556 (1972), which this Court held violated due process.

## III. The Challenge To The Repossession Laws

This action also challenges the constitutionality of the automobile repossesion and resale provisions of the Illinois Commercial Code. Similar statutes have been challenged in four other cases where certiorari petitions are now pending before this Court. However, this is the only case in which the title transfer officer has been sued to enjoin him from enforcing title transfer provisions after a repossession. In the other cases, the action was brought only against the repossessing creditor.

The key constitutional question in cases that challenge repossession laws is whether a creditor's repossession of property constitutes "state action." One major argument in favor of considering it state action is that the repossessor acts in conjunction with and with the aid and assistance of a state official, whose involvement provides the essential state action. *United States* v. *Price*, 383 U.S. 787, 16 L.Ed.2d 267 (1966); *Adickes* v. *Kress & Co.*, 398 U.S. 114, 26 L.Ed.2d 142 (1970). This state official is the title transfer officer. The constitutional challenge to the repossession laws can be considered only in the full context of repossession, sale and transfer of title. Without the title officer as a party defendant, the above argument on state action cannot be fully or adequately presented.

Recognizing this fact, Mercantile and the three largest nation wide automobile financers request this Court to grant a petition for certiorari in a case where the title officer has not been sued. But none of these petitions for certiorari should be acted upon until after the decision in this case. The initial jurisdictional question in this case is whether a substantial constitutional question is presented against the Secretary requiring the convening of a three-judge district court. The answer to that question will have a direct bearing on the question of whether creditors' repossessions constitute state action. If the answer is affirmative, the cases with certiorari petitions pending would not have been decided below in light of this Court's decision concerning the title officer's involvement and they should therefore be remanded for further consideration in light of the decision here.

## IV. Mootness

1. Gonzalez does not have to seek to regain possession of his repossessed automobile in order to challenge the re-



possession and title transfer laws. Having been injured by the application of the challenged statutes, he seeks prospective declaratory and injunctive relief against future execution of these laws. Gonzalez is thus in the same procedural position as the Pennsylvania plaintiffs in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972). The action in *Fuentes* was not moot and Gonzalez' challenge here is also not moot.

2. The settlement of Gonzalez' monetary claim against Mercantile does not moot his claim for injunctive relief against either the Secretary or Mercantile. *MacQueen* v. *Lambert*, 348 F.Supp. 1334 (M.D.Fla. 1972). As to the Secretary, a money settlement with a private defendant cannot moot a valid claim for non-monetary relief against a public defendant. As to Mercantile, the payment of money to remedy an improper past repossession does not moot a claim for future relief. If anything, Mercantile's admission of past wrongs buttresses the need for prospective relief against repetition of such wrongs.

3. The adoption of new procedures by the Secretary in order to avoid the issuance of a temporary restraining order does not moot the case against him. The Secretary's new procedure does not satisfy plaintiff's prayer for relief nor does it meet the due process requirements set forth by this Court in *Mitchell* v. *W. T. Grant Co.*, ..... U.S. ....., 40 L.Ed.2d 406 (1974). And contrary to Mercantile's statement, these procedures were never approved by plaintiff's counsel. Transcript of proceedings, July 7, 1972, pp. 14 and 28.

The Secretary's procedures were proposed and adopted as a temporary expedient during the pendency of this litigation and can be administratively revoked the morning after this litigation is terminated. Mercantile's argument

that this possibility of a return to old ways is remote because the procedures have been in effect for almost two years ignores the fact that this litigation has also been in effect for almost two years and is still pending. The concept of returning to old ways is based upon a return at the termination of the litigation, not in the middle. *Gray* v. *Sanders,* 372 U.S. 368, 375, 9 L.Ed.2d 821 (1963), *Allee* v. *Medrano,* ..... U.S. ....., 40 L.Ed.2d 566, 578 (1974).

4. Mercantile finally argues that this proceeding is moot because of the remoteness of the recurrence of a controversy. But a controversy exists at the present time. This Court has held that the brooding presence of the challenged statutes and their enforcement constitutes the basis for a presently continuing controversy as long as the plaintiff must continue to make decisions affected by those statutes, here the purchase of automobiles on credit. *Super Tire Engineering Co.* v. *McCorkle,* ..... U.S. ....., 40 L.Ed.2d 1, 8 (1974).

In addition, only two common possibilities need occur—(1) the purchase of another car (2) on credit—in order to create the right of a creditor to repossess an automobile without a prior hearing. Finally, and as Mercantile concedes, the plaintiff class continues to undergo daily repossessions by the defendant creditor class as well as title transfers by the Secretary. No one is a more appropriate class representative and litigant of the issues presented here than Mr. Gonzalez, who knows and fears the true impact of repossessions.

## V. Standing

Mercantile argues that Gonzalez does not have standing to contest the constitutionality of the challenged statutes because (1) he was not injured by the operation of the statutes and (2) he failed to exhaust state judicial remedies.



1. Gonzalez has been injured by the operation of the statute. The basis for standing is "specific injury" and any injury, however small, satisfies this requirement. *United States* v. *SCRAP,* 412 U.S. 669, 689, 47 L.Ed.2d 254 (1973). Gonzalez' automobile was taken without notice or hearing; it was then sold and title to it was transferred without a hearing. He was thus deprived of his property by the operation of the challenged statutes. This Court has held that such a deprivation of property is sufficient injury to be protected by the due process clause of the 14th Amendment. *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972). An injury caused by deprivation of property which is sufficient to be protected by the due process clause is sufficient to confer standing to litigate the due process question.

Mercantile's argument that Gonzalez was not harmed by the operation of the statute because Mercantile violated the statute in repossessing the plaintiff's automobile begs the question. If Mercantile acted under color of law, a question to be decided upon remand, then it is irrelevant whether it acted in accordance with the statute or misused it. *Monroe* v. *Pape,* 365 U.S. 167, 5 L.Ed.2d 492 (1961), *United States* v. *Classic,* 313 U.S. 299, 85 L.Ed. 1368.

2. The availability of state judicial remedies for the wrongs alleged in the complaint does not bar Gonzalez' federal remedy conferred by the Civil Rights Act. Section 1983 confers a remedy for violation of federal constitutional rights. In order to bring an action under that Section, the plaintiff does not have to first exhaust state judicial remedies. *Monroe* v. *Pape,* 365 U.S. 167, 5 L.Ed. 2d 492 (1961), *Lane* v. *Wilson,* 307 U.S. 268, 83 L.Ed. 1281 (1939).

## ARGUMENT

### I.

### THIS COURT HAS JURISDICTION OVER A DIRECT APPEAL FROM A THREE-JUDGE COURT DISMISSAL FOR LACK OF STANDING AND MOOTNESS.

When a three-judge court is properly convened, there is a direct appeal to this Court from an order of the three-judge court granting or denying an injunction. 28 U.S.C. §1253. In this case the three-judge court entered a final "judgment order" (363 F.Supp. 143, reprinted at page 1a of the jurisdictional statement) dismissing the case for lack of standing and mootness and thus denied the plaintiffs' prayer for an injunction.

Mercantile alleges that "Section 1253 confers no right of direct appeal to this Court where the court below based dismissal on mootness and lack of standing." (Mercantile Br., p. 14). This assertion is (1) contrary to the explicit language and plain meaning of the statute, (2) directly contrary to a long line of decisions of the court, and (3) completely unsupported by precedent. If Mercantile's position is nevertheless adopted as a matter of policy, it would make an unworkable shambles of the three-judge court procedure.

1. The jurisdiction of this Court is manifest from the explicit language and plain meaning of the jurisdictional statute. Title 28, §1253, provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."



Mercantile has not questioned that a dismissal of the case is a denial of the injunction prayed for.[1] Rather Mercantile argues that the policy behind §1253 dictates its applicability only in those cases where the *granting* of an injunction results in the "improvident doom" of a state statute. (Mercantile Br. pp. 18-19). Under this theory, §1253 would not apply to the denial of an injunction.

Section 1253, however, means what it says—the appeal from a three-judge court order "granting *or denying*" an injunction must be taken directly "to the Supreme Court."

2. Precedent amply supports this Court's jurisdiction. In his opening brief (pp. 14-15), Gonzalez cited five cases in which this Court took jurisdiction of a direct appeal from an order of a three-judge court dismissing the case.[2]

Mercantile attempts to distinguish *Lynch* v. *Household Finance* on the basis that it was an appeal from a dis-

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[1] That a dismissal constitutes a denial of the injunction is manifest by 28 U.S.C. §2284(5), which defines the powers of a single judge when a three-judge court has been convened. It explicitly provides that the single judge "shall not . . . dismiss the action." Section 1253 requires the dismissal of the action, which constitutes a denial of the injunction and may only be entered by the three-judge court, to be appealed directly to this Court. In the case at bar the three-judge court entered the judgment order of dismissal. The Court of Appeals has no jurisdiction to review that order; the only appeal allowed by law is directly to this Court. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541 L.Ed.2d 424 (1972).

[2] *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 31 L.Ed.2d 424 (1972); *American Trial Lawyers Ass'n.* v. *New Jersey Supreme Court*, 409 U.S. 467, 34 L.Ed.2d 651 (1973); *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968); *Zwickler* v. *Koota*, 398 U.S. 241, 19 L.Ed.2d 444 (1967); and *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962).

missal for lack of subject matter jurisdiction. But the appellees' position in *Lynch* is the same as Mercantile's position here and this Court's statement of the controlling rule on direct appeals establishes that there are no distinctions among grounds for the dismissal below:

> The appellees argue that we have no jurisdiction to consider this case on direct appeal from the three-judge District Court, 28 USC §1253, because the court did not reach the merits of the appellant's claim for an injunction but dismissed for lack of subject matter jurisdiction.
>
> But whether a direct appeal will lie depends on "whether the three-judge [court was] properly convened." *Moody* v. *Flowers*, 387 US 97, 99, 18 L Ed 2d 643, 646, 87 S Ct 1544. This action challenges the constitutionality of a state statute and seeks to enjoin its enforcement. The questions it raises are substantial. It, therefore, meets the requirements for convening a three-judge court. (*Lynch* v. *Household Finance Corp.*, 402 U.S. at 541).

In addition to the cases cited in the opening brief, in *Granite Falls State Bank* v. *Schneider*, 402 U.S. 1006, 29 L.Ed.2d 428 (1971), *aff'g* 319 F.Supp. 1346 (W.D. Wash. 1970) and *Richardson* v. *Kennedy*, 401 U.S. 901, 27 L.Ed. 2d 800 (1971), *aff'g* 313 F.Supp. 1282 (W.D. Pa. 1970) this Court summarily affirmed, on direct appeal, dismissals by three-judge courts for lack of standing. In *Carter* v. *Stanton*, 405 U.S. 669, 41 L.Ed.2d 569 (1972), and *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 4 L. Ed.2d 568 (1960) this Court, on direct appeal, reversed dismissals by three-judge courts based on failure of the plaintiffs to exhaust state judicial or administrative procedures.[3]

[3] The *Carter* and *Florida Lime* decisions are particularly significant because Mercantile argues that Gonzalez lacks standing because of his failure to exhaust state judicial remedies.



3. Mercantile's position is completely unsupported by precedent. It did not cite one case where this court denied a direct appeal from an order of a three-judge court denying an injunction by dismissing the action. In four of the five cases cited by Mercantile[4] the order appealed from had been entered by a single-judge court. Although in each instance a three-judge court had previously been convened, that court had dissolved itself and remanded to the single judge. The final order appealed from was entered by the single judge. In such situations the appeal admittedly lies to the court of appeals. But in this case the three-judge court entered the final judgment order.

The other case cited by Mercantile in support of its proposition, *Mitchell* v. *Donovan*, 398 U.S. 427, 26 L.Ed. 2d. 378 (1970) was an appeal from an order which only denied declaratory judgment. All the injunctive relief requested by the plaintiffs had previously been granted and was not an issue on appeal. Section 1253 applies only to the "grant or denial of an injunction" and establishes no direct appeal from an order denying declaratory relief where there was no pending prayer for injunctive relief.

Finally, even Professor Moore now recognizes the correctness of Gonzalez' position. It is true, as Mercantile pointed out, that Moore once predicted that this Court would not continue to accept direct appeals in cases such as this. 9 Moore's Fed. Practice, §110.03(3), at 4279. However, on the basis of *Lynch* v. *Household Finance Corp.* and other cases this prediction was abandoned in the 1973

[4] *Rosado* v. *Wyman*, 395 U.S. 826, 23 L.Ed.2d 739 (1969); *Falkner* v. *Ferguson*, 414 U.S. 806, 38 L.Ed.2d 42 (No. 73-215 1973); *Mengelkoch* v. *Industrial Welfare Comm'n*, 393 U.S. 83, 21 L.Ed.2d 215 (1968); *Wilson* v. *City of Port Lavaca*, 391 U.S. 352, 20 L.Ed.2d 636 (1968).

Supplement. The correct rule was there stated to be "whether direct appeal to the Supreme Court from a three-judge court will lie depends on whether the three-judge court was properly convened and not whether the merits were reached." 9 Moore's Fed. Practice, 1973 Supp., p. 11.

4. Mercantile's argument against jurisdiction in this case is fundamentally a policy argument against the entire three-judge court procedure, including direct appeals. However, Article I, §8, Clause 9 and Article III, §2, Clause 2 of the United States Constitution, respectively, give Congress the power to create tribunals inferior to the Supreme Court and to provide for appellate jurisdiction for this Court under such regulations as Congress shall make. In response to this constitutional authority, Congress provided for three-judge courts and direct appeals in certain cases. Mercantile's argument is properly directed to Congress, not to this Court.

Mercantile advances the theory that "this Court's jurisdiction to entertain an appeal from a decision of a three judge court depends upon the grounds upon which that decision was based . . ." (Mercantile Br. p. 15) Although Mercantile argues that jurisdiction of this Court should depend upon the grounds of the decision, it does not delineate which grounds might be appealed directly here and which grounds should be required to be taken to the Court of Appeals. Indeed, it is impossible under Mercantile's theory to set forth a precise jurisdictional division between this Court and the Court of Appeals. Adoption of Mercantile's theory would therefore increase the confusion in three-judge court procedures and would be unworkable. Instead of decreasing its workload, this Court would be faced with a proliferation of cases litigating the question of its jurisdiction.



At the moment, the procedural rules in this area of three-judge court litigation are well defined. Where a properly convened three judge court has dismissed an action, this Court has never failed to take jurisdiction of a direct appeal. Reversing this well established rule would only confuse the already overly complex three-judge court practice. This Court and the Courts of Appeals would have to first determine the basis of a dismissal before assuming jurisdiction, a procedure that would only add another burden of decision in the appellate process. It can lead only to a waste of judicial energy.

Application of Mercantile's theory to past cases demonstrates its folly. *Flast* v. *Cohen,* 392 U.S. 83, 20 L.Ed.2d 947 (1968) was dismissed for lack of standing and *Baker* v. *Carr,* 369 U.S. 186, 7 L.Ed. 2d 663 (1962) was dismissed on the grounds of non-justiciability and lack of standing. In both cases, standing and justiciability were key constitutional questions to be considered and were inextricable from plaintiffs' ultimate right to prevail. In the case at bar the questions of standing and mootness present the same questions as in *Flast* and *Baker:* is there a justiciable case or controversy? Here, too, these questions cannot be separated from plaintiffs' ultimate right to prevail. As shall be pointed out below, even Mercantile has been unable to separate the question of standing from the questions of state action and due process. For the same reason that this Court took direct jurisdiction in *Flast, Baker* and the other cases cited above, it should take jurisdiction over this appeal.

Mercantile further embroiders its theory against direct appeal in cases dismissed for lack of standing or mootness by suggesting there is "an arguable absence of a case or controversy". (Mercantile Br. p. 17). This would make

the jurisdiction of the Court dependent on the correctness of the decision below: if the case is not moot and the plaintiff has standing then, a fortiori, there is no arguable lack of a case and controversy. Under Mercantile's theory, this Court would have jurisdiction to reverse but not to affirm. But two pages prior to making this argument, Mercantile recognized that this Court's jurisdiction does not depend on the correctness of the decision being reviewed. (Mercantile Br. p. 15).

An unbroken line of precedent supports this Court's jurisdiction. The mischievous consequences to litigants and courts that would result from its repudiation are enormous. The procedural rule governing the distribution of judicial responsibility under §1253 must remain clearly formulated; there is no reason to reinterpret it in such a way that litigation is delayed while new questions of appellate jurisdiction are contested. Mercantile's proposal would confuse rather than clarify. There is no need to create new traps for litigants and new burdens on courts.

## II.

## A SUBSTANTIAL CONSTITUTIONAL CLAIM IS ALLEGED AGAINST THE ILLINOIS SECRETARY OF STATE.

Mercantile contends that Gonzalez' "real dispute has been with Mercantile rather than with the Secretary of State" and "the sole purpose in suing the Secretary of State was to obtain the convening of the three judge court and to place indirect pressure upon the creditor defendants." (Mercantile Br. p. 20). The record does not support Mercantile's supposition of plaintiff's motives. Mercantile's supposition is wrong.



Gonzalez is challenging those sections of the Illinois Motor Vehicle Code that authorize the Secretary to terminate and transfer certificates of title without a hearing after a repossession. Mercantile argues that the Secretary's action "is not the effective means of the enforcement or execution of the challenged statute." (Mercantile Br. p. 21). This argument could not be more inaccurate. The Secretary is the only means of enforcement.

At present the Secretary terminates a certificate of title after a repossession without inquiry as to the propriety of the termination. Mercantile argues that this lack of action makes the certificate and the procedure "nominal".

1. The status of certificates of title and the protections required before termination or transfer thereof in all instances except after a repossession is set forth in Ill. Rev. Stat., ch. 95½, §2-118.[5] Section 2-118 provides due process protection to certificates of title and thus destroys any contention that either the certificate or its termination is "nominal". Under that statute, the Secretary must give notice of the revocation of a certificate, set a date for a hearing, issue subpoenas for the hearing if requested, and conduct hearings in compliance "with the requirements of the Constitution, so that no person is deprived of due process of law or denied equal protection of the laws." The Secretary's decision to revoke a certificate of title is then subject to judicial review. Thus the State of Illinois affirmatively provides that certificates of title are entitled to due process protection with one exception: revocation after a repossession. In that instance, the Secretary revokes and transfers the certificate of title without notice

[5] The text of the pertinent provisions of §2-118 is set forth at pages 25-26 of plaintiff's opening brief.

from the Secretary, without a hearing and without judicial review pursuant to Ill. Rev. Stats., ch. 95½, §§3-114(b) and 3-116(b).

2. The Secretary's failure to meet due process requirements when terminating a certificate of title does not make his actions "nominal"; rather it shows a denial of due process. A comparison of the Secretary's role here with the role of the court clerk in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972) and the judge in *Mitchell* v. *W. T. Grant Co.*, ..... U.S. ....., 40 L.Ed.2d 406 (1974) is demonstrative.

In *Fuentes*, a court clerk summarily issued a writ of replevin upon the conclusory assertions of the creditor seeking the writ that he was entitled to one and that he was lawfully entitled to possession of the property in question. In *Mitchell*, in order to obtain a writ of sequestration, the creditor is required to set forth by affidavit detailed and specific facts showing that he is entitled to the property in question. The affidavit is then reviewed by a judge or magistrate who determines if probable cause that the creditor is entitled to the relief requested exists. Only after that ex parte judicial review is a writ of sequestration issued. This Court held that the procedure in *Fuentes* violated due process and that the procedure in *Mitchell* does not.

Under Illinois procedure at the time Gonzalez' automobile was repossessed, the Secretary would issue a new certificate of title to a repossessing creditor merely upon the creditor's recital that the automobile had been repossessed and his conclusory statement that he was entitled to a certificate of title. In order to avoid the issuance of a temporary restraining order, the Secretary modified



this procedure to require the creditor to notify the debtor of the application for transfer of the certificate of title and the debtor is allowed to submit an affidavit of defense. In its application to transfer the certificate of title, the creditor must state that the notice was sent and that no proper affidavit of defense was received. However, the Secretary does not specify the form of notice to be sent to the debtor, does not specify the grounds of defense that may be relied upon by the debtor, does not specify the form of the affidavit, and does not review creditor determinations of whether affidavits sent in are proper.

The Secretary thus delegated his discretionary powers in the repossession process to the creditor; a party to the underlying dispute. The Secretary still transfers certificates of title summarily upon receipt of conclusory statements by creditors. The procedure of the Secretary of State in this case is thus much closer to that of the court clerk in *Fuentes* than that of the judicial officer in *Mitchell*. As such, it raises substantial constitutional questions.

By adopting a new procedure, the Secretary showed he has considerable discretionary power over title terminations and transfers after repossession. By adopting this particular procedure, he has delegated much of that power and responsibility to creditors. This delegation does not render his retained powers "nominal"; rather it represents a violation of due process.

3. Mercantile argues that the Secretary's termination and transfer of title have no real legal effect. But the present case resembles *Bay State Harness Horse Racing and Breeding Ass'n. Inc.* v. *PPG Industries, Inc.*, 365 F. Supp. 1299, 1305 (D. Mass. 1973), in which an injunction was issued against a county register of deeds who filed a writ of attachment. The three-judge court there stated

that the filing created an attachment that "restricts the owner's ability to sell or mortgage the property at its full value." Similarly, the Secretary of State's action in this case deprives the owner of title to his automobile and prevents him from selling it. The Secretary does more than merely record a transaction as in *Giordano* v. *Stubbs*, 335 F.Supp. 107 (N.D. Ga. 1971), or than merely license lenders who deal with wage assignments, *Bond* v. *Dentzer*, 325 F.Supp. 1343 (N.D. N.Y. 1971). (Cited in Mercantile Br. at p. 21)

The Secretary here makes a nonjudicial determination of property rights and he does so ex parte, without notice, without hearing, and without right to appeal. It is this proceeding, conducted pursuant to state statutes, that Gonzalez seeks to enjoin. His attack on this procedure presents a substantial federal question that requires a three-judge court to decide.

## III.

## THE CONSTITUTIONAL CHALLENGE TO THE REPOSSESSION LAWS SHOULD BE CONSIDERED ONLY IN THE FULL CONTEXT OF REPOSSESSION, SALE AND TRANSFER OF TITLE.

Pendent to the action against the Secretary, Gonzalez also challenges the constitutionality of the automobile repossession and resale provisions of the Illinois Commercial Code, Ill. Rev. Stat. ch. 26, §9-503 and §9-504. This count is brought against Mercantile, as a plaintiffs' and defendants' class action, praying that the repossession provisions of the Illinois Commercial Code be declared unconstitutional and that creditors be enjoined from the repossession and sale of automobiles under the authority of these laws.



As Mercantile notes (Mercantile Br. pp. 22-23), numerour other actions have been filed challenging the repossession provisions of the Uniform Commercial Code. Petitions for certiorari are pending before this Court in four of these cases.[6] Mercantile encourages this Court to grant one of the petitions in order to decide the important constitutional questions presented. (Mercantile Br. p. 37) On the other hand, Mercantile argues vehemently against this Court reaching any substantive issue in this case or even keeping it alive. Mercantile's position has been echoed by Ford Motor Credit Co., General Motors Acceptance Corp., and Chrysler Credit Corp., three of the largest automobile financers in the country, as amici curiae in *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed* 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842). Those creditors also appeared as amici in the Ninth Circuit on behalf of the creditor-defendant, who prevailed there. When debtor-plaintiff Adams petitioned this Court for certiorari, the amici creditors filed an amici brief in support of Adams' petition for certiorari, thus taking the unusual step of asking this Court to review a decision that they favor. Their reason was the same as Mercantile's here: this Court should decide the important constitutional issues

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[6] *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324, (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842); *Nowlin* v. *Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. 1974), *petition for cert. filed*, 42 U.S. L.W. 3703 (U.S. June 19, 1974) (No. 73-1897); *Shirley* v. *State National Bank*, 493 F.2d 739 (2nd Cir. 1974), *petition for cert. filed*, (U.S. Aug. 6, 1974) (No. 74-5091); *Gibbs* v. *Titelman*, ..... F.2d ..... (3rd Cir. 1974), *petition for cert. filed, sub nom Gibbs* v. *Garver*, (U.S. Sept. 25 1974) (No. 74-5340).

presented regarding repossession laws. Significantly, although their amici brief in this Court was filed after this Court had set the present case for a full hearing, they devoted three pages of their brief to arguing that this Court should consider the *Adams* petition for certiorari prior to the hearing in this case and after deciding *Adams* to summarily dismiss this case. (Amici Brief of Ford Motor Credit Company, et al. pp. 11-13, *Adams* v. *Southern California First Nat'l Bank, supra.*)

But the instant case is the only pending case in which a title transfer officer has been sued to enjoin him from enforcing title transfer provisions.[7] This case therefore presents an important issue that must ultimately be reached and that is not present in the cases that challenge only the repossession laws.

The key constitutional question in all the cases challenging the repossession laws is whether a creditor's repossession of property constitutes "state action." There are two broad arguments in favor of considering it state ac-

[7] In *Gibbs* v. *Titelman*, ..... F.2d ..... (3rd Cir. 1974) the title officer was made a party defendant but the complaint there was extremely vague on his role in the repossession process. As the district court noted in its opinion (369 F.Supp. 38, 43), the complaint did not even mention the statute under which the State official is empowered to act. Also, the district court in *Gibbs* allowed the Commonwealth of Pennsylvania to intervene as a party plaintiff (Order of January 9, 1973), rendering the defendant state official a nominal and non-adversary defendant. In *Michaelson* v. *Walter Laev, Inc.*, the only other case in which a state title officer was joined as a party defendant, an order to convene a three-judge court was entered (336 F. Supp. 296 (E.D.Wis. 1972)). That case has since been settled without decision on the constitutional issues.



tion. First, by the enactment of laws allowing private persons to repossess without hearing and by statutory regulation of the repossession process the state has significantly enough involved itself in private deprivations of constitutional rights to make those private actions "state action." *Public Utilities Comm.* v. *Pollak*, 343 U.S. 451, 462, 96 L.Ed. 1068 (1952); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45 (1961); *Reitman* v. *Mulkey*, 387 U.S. 369, 18 L.Ed. 2d 830 (1967). Second, the repossessor acts in conjunction with and with the aid and assistance of a state official, whose involvement provides the essential state action. *United States* v. *Price*, 383 U.S. 787, 16 L.Ed. 2d 267 (1966); *Adickes* v. *Kress & Co.*, 398 U.S. 114, 26 L.Ed. 2d 142 (1970). In his opening brief, Gonzalez demonstrated that the acts of the Secretary and the creditors are inextricably interrelated (Br. pp. 27-29), that the Secretary plays a key role in the repossession process, and that the Secretary's actions in conjunction with the creditors' repossession constitute the essential element to make the creditors' repossession state action within the meaning of the Fourteenth Amendment and 42 U.S.C. §1983. (Br. pp. 31-32).

The constitutional question of state action in a repossession case can only be fully considered in the complete context of repossession, sale and transfer of title. This can only be done where the title officer is a party defendant, as in the case at bar. When the substantiality, importance and constitutionality of the title officer's role is considered, the result will also have a direct effect on the question of state action with respect to creditors. It would be difficult for a creditor to argue that the repossession process is private action, with no aspects of state action, if the title

officer's role in the process has been declared to be unconstitutional. If the title officer is not a defendant and the constitutionality of the transfer of title after a repossession is therefore not an issue, it is difficult to give adequate consideration to the argument that the repossessor's action is state action because it is aided and enforced by the title officer.

The effect of the absence of the title officer as a party defendant upon the consideration of the question of state action is most apparent from a comparison of the Ninth Circuit decision in *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973) with the California Supreme Court decision in *Adams* v. *Department of Motor Vehicles*, ..... Cal. 3d ....., 113 Cal. Rptr. 145 (1974).[8] In *Adams* v. *Southern California Bank*, a repossession case, the title officer was not sued and there was no prayer to enjoin the title officer from continuing to transfer titles. The only question pending was whether the creditor's action alone constituted state action. In holding that it did not, the Ninth Circuit considered only whether the enactment of the statutes allowing and regulating repossessions involved the state in the repossession process significantly enough to constitute state action. The court noted only in passing that the debtors stated "that California clears the title to repossessed vehicles for the creditors."

*Adams* v. *Department of Motor Vehicles* involved a challenge to the garageman's lien laws. Under those statutes an unpaid garageman was authorized to retain and sell vehicles to which he had made repairs. After the sale,

[8] The plaintiffs in the two cases are different persons.



the Department of Motor Vehicles transferred the registration to the car. The California Supreme Court held state action existed and that the sale and transfer of registration, without a hearing, violated due process. The sale provisions of the garageman's lien law were declared unconstitutional and the defendant Department of Motor Vehicles was enjoined from transferring registrations pursuant to a lien sale.

It is thus obvious why Mercantile and the amici creditors are anxious for this Court to consider the constitutional question of state action in the context of *Adams* v. *Southern California Bank*. But the question of state action may only be fully considered in a case involving both creditor and title officer since only then can the constitutional principles be judged in the full context of the complete procedure.

The initial jurisdictional question before the Court in this case is whether a substantial constitutional question is presented against the Secretary requiring the convening of a three-judge district court. If this Court decides the Secretary's role does raise a substantial constitutional question, then the question of whether creditor automobile repossession constitutes state action must be reconsidered. Since the cases with certiorari petitions pending would not have been decided below in light of this Court's decision concerning the Secretary's involvement, they should be remanded for further consideration in light of the decision here. The important constitutional question of whether a repossession constitutes state action should not be considered in the absence of a full record and all necessary parties.

## IV.

## THIS ACTION IS NOT MOOT.

### A. Gonzalez Does Not Have To Regain Possession Of His Repossessed Automobile In Order To Challenge The Repossession And Title Transfer Laws.

Mercantile argues that because Gonzalez' automobile had been repossessed, sold and title to it transferred, he cannot obtain injunctive relief re-establishing his possession of that vehicle and therefore the entire case is moot. This argument misconceives the action.

Gonzalez did not request an injunction returning his car to him. Having been injured by the application of the Illinois repossession and title transfer statutes he sought prospective declaratory and injunctive relief against future execution of these laws. In order to bring this action Gonzalez did not have to request and obtain individual injunctive relief regarding the specific injury to him.

Gonzalez is in the same procedural position as the Pennsylvania plaintiffs in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972). In that case the plaintiffs had lost possession of their property, without notice or hearing, pursuant to the Pennsylvania replevin statutes. The plaintiffs filed an action in federal court contesting the constitutionality of the replevin statutes and requesting prospective injunctive relief against their continued enforcement. They did regain possession of the property that had been replevied from them.[9] This Court noted

[9] Three of the plaintiffs made no attempt to regain their property. The fourth plaintiff, Rosa Washington, moved for a temporary restraining order requesting the return of the property replevied from her. After a hearing, the motion was denied and she did not regain her property.



that these plaintiffs had sought only declaratory and prospective injunctive relief against the continued enforcement of the statutes authorizing pre-judgment seizure of property, to which the plaintiffs had already been subjected, and proceeded to a decision on the merits.

Gonzalez here makes the same request as the *Fuentes* plaintiffs. He seeks declaratory and prospective injunctive relief against continued enforcement of state statutes that authorize repossessions and transfers of title without a hearing. Like the plaintiffs in *Fuentes,* Gonzalez has already been subjected to such a procedure. The action in *Fuentes* was not moot and Gonzalez' challenge here is also not moot.

### B. The Settlement of Gonzalez' Monetary Claim Against Mercantile Does Not Moot The Claims For Injunctive Relief Against The Secretary Or Mercantile.

Mercantile argues that, since Gonzalez' monetary claim against it has been settled his claims for injunctive relief are moot. But the monetary claim is irrelevant to this appeal. In the action below, Gonzalez presented three separate and distinct claims. One claim was brought on behalf of himself and a class against the Secretary of State to prospectively enjoin his enforcement of the Illinois title transfer laws. Second, also on behalf of himself and a class, Gonzalez sued Mercantile, individually and as representative of a defendant creditor class, to prospectively enjoin enforcement of the Illinois repossession statutes. It is these two claims that are now on appeal. His third claim was an individual action against Mercantile for monetary damages resulting from the specific repossession. Settlement of this third claim is irrelevant to the other two, which seek prospective injunctive and declaratory relief and which have not been settled.

Indeed, no settlement with Mercantile could affect the case against the Secretary. If Gonzalez had sued only the Secretary for declaratory and injunctive relief there would be no dispute as to mootness. How can a money settlement with a private defendant moot a valid claim for non-monetary relief against a public defendant?

Furthermore, the payment of money by Mercantile to remedy an improper past repossession can not moot a claim for future relief. If anything, Mercantile's admission of past wrongs buttresses the need for prospective relief against repetition of such wrongs.[10] In attempting to support its position, Mercantile grossly misstated the case of *MacQueen* v. *Lambert,* 348 F.Supp. 134 (M.D.Fla. 1972), discussed at pp. 55-56 of plaintiff's opening brief. Mercantile alleges that *MacQueen* held only that "settlement of a damage claim against one defendant did not moot a damage claim against another defendant." (Mercantile Br. p. 36) But *MacQueen* was an action brought against two named defendants for damages and injunctive relief against both. The plaintiffs settled their damage claim against one of the defendants. The court held that the settlement of a damage claim with one defendant did not moot the claims for injunctive relief against either defendant. Significantly, the injunctive relief requested was to enjoin the defendants from enforcing the Florida landlord lien law. The court declared the statute unconstitutional and issued an injunction against its enforcement.

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[10] For purposes of this appeal and the motion to dismiss below, Mercantile accepts that Gonzalez was not in default at the time of repossession and that "Mr. Gonzalez was harmed, if at all, by [Mercantile's] violation of the Code repossession provisions. . . ." (Mercantile Br. p. 38)



### C. The Adoption Of New Procedures By The Secretary In Order To Avoid The Issuance Of A Temporary Restraining Order Does Not Moot The Case Against Him.

Mercantile argues that this case is moot as to the Secretary of State as a result of the procedure that the Secretary temporarily adopted in order to avoid the entry of a restraining order.[11]

1. Mercantile's main argument in support of this proposition is that the plaintiff approved the new procedure. This is not so. The policy proposed and adopted by the Secretary allows creditors to prepare the notice and form affidavit of defense that are sent to debtors. Counsel for plaintiff objected to that procedure when it was proposed, arguing that the Secretary should designate a specific form to be sent. (Transcript of proceedings, July 7, 1972, p. 14) It is improper for the Secretary, a public official with due process responsibilities, to delegate the administration and drafting of a required notice and form of affidavit to one of the parties to a dispute. At the conclusion of the hearing on the Secretary's proposal, plaintiff's counsel refused to approve the proposal and refused to withdraw the motion for a temporary restraining order, which was then denied. (Transcript of proceedings, July 7, 1972, p. 28).

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[11] Mercantile makes the absurd contention that the Secretary's failure to "participate" in this appeal is "further proof that a case or controversy does not continue to exist in which each of the parties has an adverse interest." (Mercantile Br. p. 35) It is equally plausible, though no more helpful, to speculate that the Secretary has not participated actively in the appeal because he feels that Mercantile's efforts in preserving the constitutionality of the present statutory scheme need no duplication, that the scheme is too embarrassing to defend or he agreed with Mercantile not to participate in order to allow Mercantile to make this argument.

Plaintiff's opposition to allowing the drafting of the notice to be delegated to the creditor proved justified. Mercantile's form affidavit (printed at p. App. 8 of plaintiff's opening brief) requires a debtor to affirmatively state that he has made all payments required and that he has a bona fide defense, although if a debtor has a bona fide defense he also has a lawful bona fide reason for not making a payment.

Such was the situation in the case at bar. At the time of repossession, Gonzalez was in a dispute with Mercantile over insurance rebates and Mercantile had received an amount in excess of the payments then due and owing on the contract. Although Gonzalez had not made one payment, he had a bona fide defense. However, Mercantile's form affidavit requires the debtor to state that he has made all payments. Gonzalez could not have signed the affidavit drafted by Mercantile; thus Gonzalez would not have been protected by the new procedure.

2. The Secretary's procedure was proposed and adopted as a temporary expedient during the pendency of this litigation. It does not satisfy plaintiff's prayer for relief, nor does it meet due process requirements. If the lower court had reached the merits of this case and ordered as its final judgment that the Secretary institute the procedure he voluntarily adopted, plaintiff would have appealed that order as inadequate and contrary to law.

Under the Illinois statutory provisions regarding revocation of certificates of title, the only procedure that will comport with both due process and equal protection is that set forth in §2-118 of the Illinois Vehicle Code regarding revocations of certificates of title in all instances except after a repossession. This statutory scheme meets due



process requirements because it requires the Secretary to give notice of revocation and to provide a due process hearing, complete with subpoena power. The Secretary's administrative decision is then subject to judicial review. Any lesser protections for those persons whose certificates are revoked after a repossession would violate equal protection.

At the very least, under *Mitchell* v. *W. T. Grant,* ..... U.S. ....., 40 L.Ed. 2d 406 (1974), due process in this case means that (1) a creditor's claim to a transfer of an automobile title must be set forth by an affidavit that states the facts upon which the claim is based and (2) such facts must be reviewed by an independent third party. Under the Secretary's temporary procedure, a creditor need only state its ultimate conclusion, the creditor drafts the notice, and the creditor is the sole judge of whether the debtor's affidavit of defense is sufficient. At no point does the Secretary review any of the facts of the case; the Secretary has delegated all of his responsibilities to one party in the dispute.

3. In his opening brief, Gonzalez argued that the case is not moot as to the Secretary because without judicial relief the Secretary is free to return to his old ways at the termination of the litigaton. (Gonzalez Br. pp. 48-51) Mercantile answers that the possibility of a return to old ways is remote because the procedures have been in effect for almost two years. The obvious defect in this argument is that the litigation has also been in effect for almost two years and is still pending through this appeal. The concept of returning to old ways is based upon the fear that the party will return to his old ways at the termination of the litigation, not in the middle. *Gray* v. *Sanders,* 372 U.S. 368, 375, 9 L.Ed. 2d 821 (1963); *Allee* v. *Medrano,* ..... U.S. ....., 40 L.Ed.2d 566, 578 (1974).

**D. Gonzalez' Personal Constitutional Claims Against The Secretary And the Defendant Creditor Class Are Not Moot.**

Mercantile argues that the recurrence of a controversy between Gonzalez and the defendants is remote because five events must occur for the case or controversy to again be presented. This contention is in error for two reasons: first, a controversy need not recur since it exists at the present time; second, only two of the five events Mercantile recites must occur in order to reach the point of another repossession.

1. The repossession and title transfer laws are still on the books and are still being enforced daily. They represent a fixed, definite and official policy of the State of Illinois to which Gonzalez has already been subjected. The presence of these laws is therefore a factor lurking in the background of Gonzalez' continuing decisions about whether to purchase another automobile on credit. If he decides to make such a purchase, that state policy will substantially affect his dealings with his creditor. Thus, "governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co.* v. *McCorkle*, ..... U.S. ....., 40 L.Ed.2d 1, 8 (1974).

*Super Tire* is dispositive of the issue of whether there is a continuing controversy. In that case, the plaintiff company's employees were on strike against it. New Jersey regulations allowed the workers engaged in the strike to obtain public assistance through the state welfare program. The company then brought an action against the administrators of the public welfare program seeking



a declaration that the regulations providing benefits to striking workers were void. During the pendency of the case, the strike was settled, the employees went back to work and they were removed from the public assistance rolls. The Court of Appeals for the Third Circuit then held that the case was moot. On certiorari this Court reversed the mootness judgment and remanded the case for further proceedings on the merits of the controversy. This Court held that the continuing presence of the regulations would affect the collective bargaining relationship, both in the context of any current labor dispute and in the ongoing relationship between company and union. Because of this ongoing effect, the case was not moot.

2. Mercantile argues that in order for Gonzalez to be again brought to the point of repossession he would have to "(1) purchase a new car, (2) on a retail installment contract, (3) with Mercantile, (4) that does not have a provision requiring a hearing prior to repossession, and (5) default on his loan payments." (Mercantile Br. p. 32) In fact only the first two need occur.

Gonzalez' future creditor need not be Mercantile in order to preserve his claim against the Secretary. Thus as to the Secretary, Mercantile's third contingency is irrelevant. Although Gonzalez will probably attempt to avoid future dealings with Mercantile, this is not within his control since Mercantile is merely an assignee of notes and not an auto retailer.

Mercantile's argument that a motor vehicle retail installment contract might have a provision requiring a hearing prior to repossession and is therefore a viable contingency borders on the ridiculous. Motor vehicle retail installment contracts for the purchase of used cars are adhesion contracts. They are drafted by either the retailer or the

financer.[12] Such contracts do not contain provisions for a hearing.

Nor does Gonzalez have to default on his loan payments in order to reach the point of repossession. Throughout this case, Mercantile has adopted the position that Gonzalez was not in default when his car was repossessed. He therefore need not necessarily be in default in the future in order to suffer another repossession.

Only two extremely likely contingencies—(1) the purchase of another car (2) on credit—need not occur to create the right in the creditor to repossess the automobile without a prior hearing. Such a repossession could be for any reason, including mistake.

### E. Even If Gonzalez' Personal Claims Against The Secretary And Mercantile Are Moot The Plaintiff Class Claims Against The Secretary And the Defendant Class Are Viable And the Litigation May Continue.

Mercantile argues that the case is moot because of the remoteness of any future dispute in the case. While Mercantile arduously asserts the unlikelihood of Gonzalez' embroilment in any future repossession dispute, it concedes the obvious fact that other members of the plain-

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[12] In this case the contract Gonzalez signed was on a form drafted and provided to the retailer by Mercantile. For an excellent discussion of the automobile finance industry and the extent to which financers set the terms of credit contracts with automobile purchases, see P. Schuchman, "Profit on Default: An Archival Study of Automobile Repossession and Resale," 22 Stan.L.Rev. 20 (1969):

> The financers largely create both the legal and economic models that regulate the retail installment sale of cars. The financers provide the forms to be used for the dealer contract and for the retail installment sale.



tiff's class are continuing to undergo repossession of their automobiles by members of the defendant creditor class, including Mercantile. Thus the only challenge to the viability of the plaintiff's class claim is the alleged mootness of Gonzalez' individual claims against Mercantile. Plaintiffs' position that Gonzalez may continue the litigation on behalf of the class has already been set forth in the opening brief, pp. 51-53, and will not be repeated here. The Plaintiffs will respond to the cases cited by Mercantile in support of its position. (Mercantile Br. p. 35)

In *Dillard* v. *Industrial Comm'n. of Virginia,* 409 U.S. 238, 34 L.Ed.2d 444 (1972), the plaintiff brought a class action challenging the constitutionality of a state regulation that permitted temporary suspension of his workmen's compensation payments without a prior hearing. A three-judge district court upheld the constitutionality of the regulation and the plaintiff appealed. This Court vacated the lower court's ruling and remanded the case to the district court for a determination as to mootness because the named plaintiff had settled his entire claim with the defendant. Upon remand, the district court allowed an additional plaintiff to intervene thereby deciding that the class action aspects of the litigation were not mooted by the complete settlement of the original plaintiff's claim. The district court then reinstated its prior decision upholding the constitutionality of the regulation and a second appeal was brought to this Court. In its second decision, *Dillard* v. *Industrial Comm'n of Virginia,* ..... U.S. ....., 40 L.Ed.2d 540 (1974), this Court implicitly accepted the district court's decision that the action was not moot by vacating the lower court's order and remanding for reconsideration of an unrelated question. Thus, the *Dillard* decisions support the plaintiff's position here.

In *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 35 L.Ed.2d 62 (1973), this Court remanded the case to the district court for consideration as to mootness because, concurrently with the federal action, the plaintiff pursued state remedies and obtained full relief for herself in the state proceeding. This situation is inapposite to the case at bar. Here Gonzalez has not obtained full relief nor has he pursued state remedies for similar relief during the pendency of this action.[13] In any event, the three paragraph remandment to consider the question of mootness in *Burney* does not stand for the pervasive principle of law that Mercantile would have us believe.

*O'Shea* v. *Littleton*, 414 U.S. 488, 38 L.Ed.2d 674 (1974), is not a mootness decision. *O'Shea* held that there was no case or controversy because "none of the named plaintiffs [was] identified as having himself suffered any injury in the manner specified." Here, Gonzalez was in fact injured by the defendants acting pursuant to the challenged statutes. He may therefore maintain this action on behalf of the class. *Bailey* v. *Patterson*, 369 U.S. 31, 7 L.Ed.2d 512 (1962).

No one is a more appropriate class representative and litigant of the issues presented here than Mr. Gonzalez, who knows and fears the true impact of repossessions.

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[13] The state court action filed by Gonzalez against Mercantile, the used car dealer and others (which is more fully described in the opening brief, p. 54, footnote 14) does not overlap or bear on this case in any way. That case was a fraud and malicious prosecution action arising out of a confession of a deficiency judgment against Gonzalez subsequent to the repossession, sale and transfer of title. Indeed, as plaintiff shall discuss in Point V below, Mercantile argues that Gonzalez lacks standing because he did not bring a state court action regarding the repossession and sale involved here.



## V.

## GONZALEZ HAS STANDING TO CONTEST THE CONSTITUTIONALITY OF THE REPOSSESSION AND TITLE TRANSFER STATUTES.

Gonzalez brings this action under 42 U.S.C. §1983 challenging the constitutionality of certain Illinois statutes that authorize the taking, selling and transfer of a title to an automobile on a creditor's unilateral determination of default on a contract. After a unilateral decision by a creditor, the taking, selling and transfer of title proceeds without the initial decision or any subsequent step being subject to judicial review or independent third party hearing. Gonzalez challenges this procedure under the due process and equal protection clauses of the 14th Amendment.

Mercantile alleges that Gonzalez does not have standing to contest the constitutionality of the challenged statutes because (1) he was not injured by the operation of the statutes and (2) he failed to exhaust state judicial remedies.

### A. Gonzalez Has Been Injured By The Operation Of The Statutes.

Mercantile admits that the basis for standing is "specific injury." Where injury exists, degree of injury is irrelevant. Any injury, however small, satisfies the requirement of specific injury. Thus, in *United States* v. *SCRAP*, 412 U.S. 669, 689, 47 L.Ed.2d 254 (1973) this Court approvingly quoted Professor Davis as follows:

> "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing, and the principle supplies the motiva-

tion." Davis, Standing: Taxpayers and Others, 35 U Chi L Rev 601, 613.

Acting on this principle this Court found standing when the injury to the plaintiff consisted of being deprived of only a fraction of a vote, *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962); a $5.00 fine and costs, *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393 (1961); and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 16 L.Ed.2d 169 (1966).

In this case, Gonzalez's automobile was taken pursuant to §9-503 without notice or a hearing. His car was then sold pursuant to §9-504 of the Illinois Commercial Code and title transferred pursuant to §§3-114(b) and 3-116(b) of the Motor Vehicle Code, without a hearing. He was thus deprived of his property by the operation of the challenged statutes. This is a sufficient injury in fact to confer standing. In *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972), this Court held that the temporary deprivation of household furnishings and children's toys without due process was sufficient injury to be protected by the due process clause of the 14th Amendment. Clearly, an injury caused by deprivation of property which is sufficient to be protected by the due process clause is sufficient to confer standing to litigate the due process question.

Mercantile argues that Gonzalez was not harmed by the operation of the challenged statutes because they provide for repossession only in the event of default and Gonzalez was not in default when his car was repossesed. The reasoning is that Gonzalez was harmed by Mercantile's violation of the law in repossessing Gonzalez's automobile, not by the proper operation of the statutes. That answer begs the question. Gonzalez was injured when his automobile was wrongfully repossessed, sold and title to it transferred. The purpose of the hearing is to prevent such wrongful deprivation of property.



A question to be decided upon remand is whether Mercantile acted "under color of law." If Mercantile acted under color of law, then it is irrelevant whether it acted in accordance with the statute or misused it. Section 1983 gives a right of action against a person who, under color of state law, subjects another to the deprivation of any rights, privileges or immunities secured by the federal Constitution. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961). As stated in *United States* v. *Classic*, 313 U.S. 299, 85 L.Ed. 1368:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (313 U.S. at 326).

Mercantile further argues that Gonzalez was not injured by the operation of §§9-503 and 9-504 because §9-507 of the Illinois Commercial Code provides for damages and the possibility of the debtor obtaining an injunction against disposition if the former sections are violated. By providing a remedy for violation of the repossession provisions, §9-507 implicitly recognizes that, when property is wrongfully repossessed pursuant to §9-503, the debtor is injured by operation of that statute. This injury is sufficient to confer standing.

### B. The Availability Of State Judicial Remedies For The Wrongs Alleged In The Complaint Does Not Bar Gonzalez' Federal Remedy Conferred By The Civil Rights Act.

1. Mercantile also challenges Gonzalez' standing to bring this action because he did not file an affirmative action in state court under §9-507 of the Illinois Commercial Code. This construction negates both the language and policy of the Civil Rights Act. Section 1983 confers

a remedy for violation of federal constitutional rights. It contains no exceptions. Title 28, §1343(3) provides that federal district courts are to have "original jurisdiction" of such cases. It contains no exceptions. The obvious purpose of this legislation is to give the litigant his choice of a federal forum. *Romero* v. *Weakley,* 226 F.2d 339 (9th Cir. 1955).

Mercantile's contention has been explicitly rejected by this court. In *Monroe* v. *Pape,* 365 U.S. 167 5 L.Ed.2d 492 (1961) the Court stated:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (365 U.S. at 183).

In *Lane* v. *Wilson,* 307 U.S. 268 (1939) this Court, in an action under the very section invoked here, said:

> "To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. . . . Barring only exceptional circumstances (citations omitted) or explicit statutory requirements (citations omitted) resort to a federal court may be had without first exhausting the judicial remedies of state courts." (307 U.S. at 274).

2. Mercantile claims that a state court action under §9-507 is necessary in order to present this Court "with a complete record which would enable it to weigh the adequacy of due process protection presently provided by §9-507 . . ." (Mercantile Br. pp. 42-43) and cites *Mitchell* v. *W. T. Grant Co.,* ..... U.S. ....., 40 L.Ed. 2d 406 (1974) in support of this proposition.



Mercantile is here merging the question of standing with the question of due process. Its theory is wrong both as a matter of standing and of due process.

a. Failure to bring a state court action to enjoin disposition does not bar a federal action challenging the constitutionality of the law allowing the taking in the first place. *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972). Under the Pennsylvania statutes challenged in *Fuentes,* the parties who lost property through replevin could have initiated a lawsuit challenging the seizure. None of the Pennsylvania plaintiffs initiated such an action, but instead filed a §1983 complaint in federal court. (407 U.S. at 78) This Court reviewed the case on the merits and declared the replevin statutes unconstitutional. There was no standing bar in *Fuentes* and there is none here.

b. Nor does *Mitchell,* a due process decision, support Mercantile's due process argument. Section 9-507 does not provide adequate due process protection under the guidelines of *Mitchell.* Both the opinion of the Court and Mr. Justice Powell's separate opinion carefully delineated the due process protections provided by the Louisiana sequestration statutes and differentiated them from the Florida and Pennsylvania replevin statutes, considered in *Fuentes,* which were lacking in these protections. The Louisiana statutes provided for a prompt automatic adversary hearing after sequestration to determine the merits of the controversy with the burden of proof on the complaining creditor. On the other hand, the replevin statutes in *Fuentes* required the debtor to initiate any proceeding for a hearing on the merits and placed the burden of proof on the debtor. Section 9-507 similarly places the burden of obtaining a hearing and the burden of proof on the debtor.

It is thus clearly more comparable to the replevin statutes struck down in *Fuentes* than the sequestration statutes allowed to stand in *Mitchell*. This Court has long recognized that where the burden of proof lies may be decisive of the outcome and that the shifting of the burden of proof because of actions taken without notice or hearing may violate both due process and equal protection. *Armstrong* v. *Manzel*, 380 U.S. 545, 14 L.Ed. 2d 62 (1965); *Speiser* v. *Randall*, 357 U.S. 513, 2 L.Ed. 2d 1460 (1958).

## CONCLUSION

For the reasons stated, appellant respectfully requests that this Court (1) determine that substantial constitutional questions are presented against the Secretary of State and Mercantile National Bank; (2) assume jurisdiction of this appeal; and (3) reverse the judgment of the district court and remand the case to that court for a decision on the merits.

Respectfully submitted,

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